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In The

Supreme Court of the United States

CITY OF CHICAGO HEIGHTS and the CHICAGO HEIGHTS ELECTION COMMISSION,

Petitioners,

v.

RON HARPER, KEVIN PERKINS, WILLIAM ELLIOT and ROBERT MCCOY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

James C. Craven
Donald M. Craven
1005 North Seventh Street
Springfield, IL 62702
217-544-1777

Michael P. Seng
Counsel of Record
315 South Plymouth Court
Chicago, IL 60602
312-987-1446

Attorneys for Respondents Ron Harper, William Elliot, and the Plaintiff Class

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT

I. The Court Of Appeals Decision Does Not Conflict Either With The Decisions Of This Court Or With The Decisions Of Other Courts of Appeal.

In its attempt to justify the issuance of a writ of certiorari, petitioner repeatedly misrepresents the record and the decisions of the District Court and the Court of Appeals below. Although the Court of Appeals did not accept the argument made below by respondents Ron Harper, William Elliot, and the plaintiff class, respondents submit that the decision of the Court of Appeals of August 28, 2000, *Harper v. City of Chicago Heights*, 223 F.3d 593 (7th Cir. 2000), is neither inconsistent with its earlier opinion of February 7, 1995, *Perkins v. City of Chicago Heights*, 47 F.3d 212 (7th Cir. 1995), nor with decisions of other courts of appeal or with decisions of this Court.

The first decision of the Court of Appeals for the Seventh Circuit in this case rendered on February 7, 1995 addressed the sole issue whether a consent decree that was entered without any finding of liability could alter valid state election laws without a finding that the decree was necessary to remedy a violation of federal law or of the United States Constitution. The Court of Appeals held that:

> "While parties can settle their litigation with consent decrees, they cannot agree to 'disregard valid state laws,' *People Who Care v. Rockford Bd. of Educ.*, 961 F.2d 1335, 1337 (7th Cir. 1992); *Kasper v. Bd. of Election Com'rs of City of Chicago*, 814 F.2d 341 (7th Cir. 1987), and cannot consent to do something together that they lack the

> power to do individually. *Kasper*, 814 F.2d at 341-42. . . . Because a consent decree is not just an agreement between two parties, but is also a judicial act, district courts must ensure that the consent decrees they approve respect this principle as well as the rights of third parties. *EEOC v. Hiram Walker & Sons*, 768 F.2d 884, 889 (7th Cir. 1985), cert. denied, 478 U.S. 1004, 106 S.Ct. 3293, 92 L.Ed.2d 709 (1988); *South v. Rowe*, 759 F.2d 610, 613 n.3 (7th Cir. 1985)." *Perkins v. City of Chicago Heights*, 47 F.3d 212, 216 (7th Cir. 1995).

The first Court of Appeals decision did not otherwise address the question whether the remedy corrected the violation because at the time the Court of Appeals rendered its decision in 1995, no finding had yet been entered that the commission form of government heretofore utilized by the City of Chicago Heights violated Section 2 of the Voting Rights Act.

This was not the case when the Court of Appeals reviewed the District Court's remedy in the second appeal in 2000. The District Court had made a specific finding on March 4, 1997 that the commission form of government as it formerly existed in Chicago Heights violated the Voting Rights Act under the factors identified by this Court in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). This finding has never been challenged or contested. Furthermore, the District Court had reviewed the new form of government enacted by referendum on November 7, 1995, after the case was first remanded by the Court of Appeals, to see if it provided a suitable remedy.

The District Court found that the variation of the strong mayor form of government, which the City had ratified in the referendum, did not remedy the violation. The referendum ratified the plan vacated by the Court of Appeals in 1995 whereby the City was divided into six wards, each ward electing one member to a six-person city council. Because there was an even number of council members (three white, two African-American, and one Hispanic), the mayor, who was elected at-large, frequently was called upon to act as a tiebreaker. The mayor was also given power to appoint certain city officials beyond what was allowed by state statute. The District Court found that:

> "Notably by granting significant power to the mayor and Board president [of the Chicago Heights Park District] who are both elected at-large, the proposed systems perpetuate the race-based violation of the Voting Rights Act that occurred in the previous at-large voting system. See, e.g., *Dillard v. Crenshaw County, Alabama*, 831 F.2d 246 (11th Cir. 1987) (finding that a proposal for restructuring election scheme for county commission which allowed for an at-large election of the chairperson violated the Voting Rights Act); *Harvell v. Blytheville School Dist.*, 126 F.3d 1038, 1040 (8th Cir. 1997) (finding that a 5-2 system proposed by the school district in which five members would be elected from districts and two members would be elected at-large is not an adequate remedy to remedy a voting violation caused by an at-large system: '[t]he inability of black voters to affect the at-large elections under the 5-2 plan is no different from what it was under the previous electoral scheme'); *Buchanan v. City of Jackson*, 683

> F. Supp. 1537, 1545 (W.D. Tenn. 1988) (Todd, J.) (rejecting a proposed remedy in which six commissioners would be elected from districts and three would be elected at-large because 'the potential would remain for the election of an administration that is unresponsive to the needs of the black community'). *See generally Thornburg v. Gingles*, 478 U.S. 30, 49, 106 S. Ct. 2752, 2766, 92 L.Ed.2d 25 (1986) (finding that at-large systems 'where minority and majority voters consistently prefer different candidates, the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters.' " *McCoy v. City of Chicago Heights*, 6 F.Supp.2d 973, 980 (N.D. Ill. 1998).

In reaching this decision, the District Court rejected the counter-arguments proposed by the City and the plaintiff class. The Court of Appeals agreed with the District Court that the evidence led to the conclusion that "vote dilution would still rise to the level of a Section 2 violation." *Harper v. City of Chicago Heights*, 223 F.3d 593, 600 (7th Cir. 2000). The Court of Appeals thus held that:

> "Not everyone would agree, but we find the court's conclusion to be within the range of permissible inferences from this evidence, and hence not clearly erroneous. We therefore affirm the district court's rejection of the referendum system insofar as it is applied to the City." *Harper, supra*, 223 F.3d at 600.

The District Court's and the Court of Appeals' decisions were well grounded in precedent.

Nor does the decision of the Court of Appeals conflict with *Hines v. Mayor and Council of Ahoskie*, 998 F.2d 1266 (4th Cir. 1993) or *Holder v. Hall*, 512 U.S. 874, 114

S.Ct. 2581, 129 L.Ed2d 687 (1994), as suggested by petitioner. *Holder* addressed whether a single member commission form of government violates Section 2 and not what is a proper remedy once a Section 2 violation is found. *Ahoskie* is distinguishable on its record. The remedy in Chicago Heights was already in place and the District Court was able to look at the actual experience under the plan; whereas, the District Court in reviewing the Ahoskie plan relied on mere "hypothetical" models. 998 F.2d at 1292.

Petitioner resorts to hyperbole when it states that "the Court of Appeals effectively has held that the only approvable remedy in Chicago Heights is one under which minority voters and their candidates are guaranteed success in implementing the agenda of their choice" and "mandates *minority control* of the Chicago Heights City Council." *Petitioner's Brief* at 23 – 24.[1]

Instead, the Court of Appeals affirmed the finding of the District Court that the plan adopted by referendum was not a complete remedy based on the precedents of this Court and other courts of appeals and district courts. The Court of Appeals correctly held that the District Court's conclusion was not clearly erroneous. Underlying

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[1] Adoption of a seven-member city council, which was ordered by the District Court and approved by the Court of Appeals, would not as a matter of fact result in either a guarantee that minority voters or candidates would be able to implement their agenda or in minority control of the city council. In fact, respondents had opposed the seven-district plan in the District Court and in the Court of Appeals because it could well result in less control and participation by minorities on the council than the present six-district plan.

the decision was the unchallenged earlier finding that the prior system of government in Chicago Heights violated Section 2 of the Voting Rights Act and, therefore, the Court could not review the plan adopted by referendum as though "it had emerged from thin air." *Harper, supra,* 223 F.3d at 599.

II. The Court Of Appeals Decision Does Not So Far Depart From The Accepted Course Of Judicial Proceedings To Merit Review By This Court.

The District Court followed accepted procedures in reviewing the remedy, and these procedures were acknowledged by the Court of Appeals. Following a finding that the prior plan violated Section 2 of the Voting Rights Act, the District Court gave the parties leave to submit plans to remedy the underlying Voting Rights Act violations. The petitioner and the respondent class members resubmitted the plan previously approved and adopted by the voters in a referendum. The respondent class submitted the existing plan without any changes, but the petitioner submitted modifications in the districts. The dissenting plaintiffs, Perkins and McCoy, submitted a third plan.

The District Court reviewed these plans and concluded that the plans submitted by the plaintiff class and the City did not remedy the violation. The Court held that the city council should consist of seven members selected by cumulative voting, rather than six members elected by district as approved in the referendum. The Court of Appeals affirmed the seven-person remedy but reversed the cumulative voting remedy on the ground

that it departed substantially from Illinois law and was opposed by the City, the plaintiff class, and the dissenting plaintiffs. The Court of Appeals noted that the District Court's remedy suffered from the same flaws as the original consent decree – it modified Illinois law "without either going through the statutorily required procedures for making such changes to electoral methods or making a judicial finding that it was necessary to make these changes in order to comply with federal law." *Harper, supra,* 223 F.3d at 601.[2]

The District Court grounded its approach in existing case law. The City was given an opportunity to submit its plan. Allowing the defendant to propose a remedy dates at least back to *Brown v. Board of Education of Topeka,* 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed.2d 1083 (1955). Relying on *Williams v. City of Texarkana, Ark.,* 32 F.3d 1265, 1268 (8th Cir. 1994) and *Harvell v. Blytheville School Dist.,* 126 F.3d 1038, 1040 (8th Cir. 1997), the District Court properly noted that it would not defer to the City's plan if it did not completely remedy the violation or if the plan itself violated Section 2 of the Voting Rights Act. *McCoy, supra,* 6 F.Supp.2d at 977.

Quoting *Cane v. Worcester County, Md.,* 35 F.3d 921 (4th Cir. 1994), *cert. denied,* 513 U.S. 1148, 115 S.Ct. 1097, 130 L.Ed.2d 1065 (1995), the Court of Appeals similarly acknowledged that when the defendant fails to offer an acceptable remedy, the Court must "to the greatest extent

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[2] The Court of Appeals neither condoned nor condemned cumulative voting as a remedy. It simply held that the record did not disclose any reason to impose it in this case against the City's wishes.

possible give effect to the legislative policy judgments underlying the current electoral scheme or the legally unacceptable remedy offered by the legislative body." *Harper, supra,* 223 F.3d at 602.

The Court of Appeals recognized that the city demonstrated a clear preference for single-member districts and found that the District Judge had not sufficiently deferred to that preference when it imposed a remedy of cumulative voting. *Harper, supra,* 223 F.3d at 602. Furthermore, it deferred to the City even though the City did not articulate why it preferred single-member districts to cumulative voting. *Harper, supra,* 223 F.3d at 602. Thus, the City's preferences have been deferred to, except to the minimal extent found by the District Court and the Court of Appeals to be necessary to remedy the violation of Section 2 of the Voting Rights Act.

The fact that the City's preferred remedy of six rather than seven districts was ratified by a referendum is not conclusive. The referendum was required under state law. *See Perkins v. City of Chicago Heights,* 47 F.3d 212, 217 n. 3 (7th Cir. 1995). The cases are legion that a referendum cannot legalize a remedy that otherwise violates federal law. *Romer v. Evans,* 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996); *Washington v. Seattle School Dist. No. 1,* 458 U.S. 457, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982); *Lucas v. Forty-Fourth General Assembly of Colorado,* 377 U.S. 713, 736, 84 S.Ct. 1459, 12 L.Ed.2d 632 (1994).

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

JAMES C. CRAVEN
DONALD M. CRAVEN
1005 North Seventh Street
Springfield, IL 62702
217-544-1777

MICHAEL P. SENG
Counsel of Record
315 South Plymouth Court
Chicago, IL 60602
312-987-1446

Attorneys for Respondents Ron Harper, William Elliot, and the Plaintiff Class